No. 21850

United States Court of Appeals

For the Ninth Circuit

ALFRED ROMERO AND GLORIA J. ROMERO,
Appellants,

vs.

TEN EYCK-SHAW, INC.,
Appellee.

Petition for Rehearing

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No. 21,850

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For the Ninth Circuit

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Appellants,

vs.

TEN EYCK-SHAW, INC.,
Appellee.

Petition for Rehearing

Appellants petition the Court for a rehearing on this matter on the ground that the Court has overlooked or misapprehended the major import of appellant's argument and the authority cited in support thereof.

The Court has based its decision affirming a summary judgment against appellants upon its determination that Nevada law applies to the case and that the application of such law precludes the maintenance of this action. On page 2 of its opinion, this Court said (in the first full paragraph), "Therefore, if Nevada law is applicable, Romero has no cause of action against Ten Eyck." The Court then decided that Nevada law was in fact applicable and it followed from there to the conclusion that Romero has no cause of action.

Appellants concede for the purpose of argument only that this is a case in which either Nevada or Arizona law could have been properly applied because there has never been a firm choice of law rule established by the Supreme Court and the full faith and credit clause of the U.S. Constitution is not so inflexible as to preclude the application of either law. But, appellants contend that the question involved in this case does not present a conflict of laws problem so much as it presents a problem of interpretation and construction of statutes. It is the position of appellants that it makes no difference whether the Court applies the law of Arizona or Nevada, this action is maintainable and appellee's motion for summary judgment should have been denied. It is this point which appellant believes the Court overlooked because it was not mentioned in the Court's opinion.

Appellant's point was illustrated on pages 4 and 5 of appellant's opening brief in the case of *Pacific Employers Insurance Co. v. Industrial Accident Commission* (1939), 306 U.S. 493, 59 S.Ct. 629, 83 L.Ed. 940, which held that the California Industrial Accident Commission could properly make an award to a Massachusetts workman who was injured in the course of his employment while temporarily in California. This result was reached even though the workman was entitled to receive compensation under the laws of Massachusetts and even though the Massachusetts law purported to provide an exclusive remedy.

Appellants' position was more clearly illustrated and more forcefully supported, however, on pages 11 and 12 of appellants' opening brief. On these pages is presented the case of *Industrial Commission of Wisconsin v. McCartin* (1947), 330 U.S. 662, 67 S.Ct. 886. In that case, referring to the Illinois Workmen's Compensation statute (which is similar to both Arizona and Nevada law in wording and content) the Court said:

> "But there is nothing in the statute or in the decisions thereunder to indicate that it is completely exclusive, is designed to preclude any recovery by proceedings brought in another state for injuries received there in the course of an Illinois employment (citing cases). And in light of the rule that workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted (citing cases), we should not readily interpret such a statute so as to cut off an employee's right to sue under other legislation passed for his benefit. Only some unmistakable language by a state legislature or judiciary would warrant our accepting such a construction. Especially is this true where the rights affected are those arising under legislation of another state and where the full faith and credit provision of the United States Constitution is brought into play."

The Illinois "exclusive coverage" statute involved in this case reads in part as follows:

> "No common law or statutory right to recover damages for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, shall be available to any employee who is covered by the provisions of this act . . ." (Ill. Rev. Stat. 1943, ch 48)

Referring to this statute the Court in *McCartin* said:

> "This section has been interpreted to mean that in situations to which the act applies, the right of action against the employer under the Illinois common law or under the Illinois Personal Injuries Act has been abolished."

The clear import of the Court's statements in the *McCartin* case is that an "exclusive coverage" statute which is worded just as strongly as either the Arizona or Nevada statute is not sufficient to preclude the maintenance of an action under the laws of another state. It is generally

understood that a statute which intends to provide absolute exclusive coverage and even preclude actions brought under the laws of another state must say so explicitly or it will be interpreted to apply only to causes of action arising under the laws of the state in which the statute is enacted.

This is the point which appellants feel the Court overlooked in reaching its decision in the present case and upon which they base this petition for rehearing.

WHEREFORE, it is respectfully submitted that this Court reconsider its original decision pursuant to the points and authorities as set forth in this Petition for Rehearing.

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